IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Remanded by the Supreme Court October 15, 2007

STATE OF TENNESSEE v. RICKIE JAMES STALLINGS

Appeal from the Circuit Court for Sevier County
No. CR9320 Richard R. Vance, Judge

No. E2007-02324-CCA-RM-CD - Filed March 6, 2008

The defendant, Rickie J. Stallings, appealed his Sevier County Circuit Court convictions of attempted aggravated arson, aggravated assault, assault, and possession of explosive components, and this court affirmed the convictions and consecutive service of the sentences but modified the effective sentence from 18 to 16 years. *See State v. Rickie J. Stallings,* No. E2005-00239-CCA-R3-CD (Tenn. Crim. App., Knoxville, Jul. 26, 2006), *reh'g denied* (Tenn. Crim. App. Oct. 3, 2006), *perm. app. granted, case remanded* (Tenn., Oct. 15, 2007). On October 15, 2007, our supreme court remanded the case to this court for reconsideration in light of the supreme court's opinions in *State v. McGouey*, 229 S.W.3d 668 (Tenn. 2007) (*McGouey II*), and *State v. Gomez*, 239 S.W.3d 733 (Tenn., Nashville, Oct. 9, 2007) (*Gomez II*). Following additional briefing and oral argument, we modify the conviction of aggravated assault to assault pursuant to *McGouey II*, impose a sentence of 11 months, 29 days for the assault, and, pursuant to *Gomez II*, modify the sentence for attempted aggravated arson to 10 years.

Tenn. R. App. P. 3; Judgments of the Circuit Court Reversed in Part, Affirmed in Part, Modified

JAMES CURWOOD WITT, JR., J., delivered the opinion of the court, in which JOSEPH M. TIPTON, P.J., and NORMA MCGEE OGLE, JJ., joined.

G. Scott Green, Knoxville, Tennessee, for the appellant, Rickie J. Stallings.

Robert E. Cooper, Jr., Attorney General & Reporter; Leslie E. Price, Assistant District Attorney General; James B. Dunn, District Attorney General; and Steven R. Hawkins and Nichole D. Bass, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

I. Procedural Background

This court filed its opinion in this cause on July 26, 2006. *See State v. Rickie J. Stallings*, slip op. at 1. On October 15, 2007, in the wake of *McGouey II* and *Gomez II*, the Tennessee Supreme Court granted the defendant's pending application for permission to appeal for the limited purpose of remanding the case to this court for reconsideration in light of *McGouey II* and *Gomez II*.

In *McGouey II*, the supreme court made determinations about the meaning of the phrase "deadly weapon" as used in Tennessee Code Annotated section 39-13-101(a)(1)(B) as an element of aggravated assault. The same issue was raised by the defendant in his challenge to the sufficiency of the evidence of aggravated assault, and this court relied upon its opinion in *State v. Thomas Martin McGouey*, No. E2005-00642-CCA-R3-CD (Tenn. Crim. App., Knoxville, May 24, 2006) (*McGouey I*), *rev'd by McGouey II*, in determining that the kerosene-filled plastic jug used by the present defendant was a deadly weapon. *See Rickie J. Stallings*, slip op. at 23.

In *Gomez II*, the supreme court held that provisions of the pre-2005 Tennessee sentencing law violated Gomez' right to trial by jury and reversed the position the court had taken in *State v. Gomez*, 163 S.W.3d 632 (Tenn. 2005) (*Gomez I*), that the application of the pre-2005 law did not equate to plain error. In *Rickie J. Stallings*, we relied upon *Gomez I* in rejecting the defendant's bid to overturn his sentencing determinations.

Pursuant to the October 15, 2007 order of remand, we now reconsider (1) the issue of the sufficiency of the evidence of aggravated assault as it relates to the meaning of the element "deadly weapon" and (2) the impact of the invalidity of the sentencing law applied in the present case. All other issues adjudicated in *Rickie J. Stallings* are left undisturbed and unaltered by this opinion.[1]

II. Sufficiency of the Evidence of Aggravated Assault: the "Deadly Weapon" Element

[1] Upon the filing of the supreme court's remand order, this court ordered further briefing and conducted oral arguments on January 29, 2008. During argument, and later in his supplemental brief, counsel for the defendant stated, in effect, that the conviction of assault in count three of the indictment was duplicitous of the charge of aggravated assault alleged in count two and that the count three assault conviction should be vacated and that charge dismissed. Respectfully, we decline to disturb the assault conviction. First, we are generally constrained by the terms of the supreme court's remand, which instructed this court to reconsider its direct-appeal adjudication in view of *McGouey II* and *Gomez II*. Second, although the defendant competently raised myriad issues in his 2005 direct-appeal briefs to this court, a claim of duplicitous charging was not among them. Third, we note that in the State's closing argument before the jury on August 14, 2003, the prosecutor remarked that the basis for the count three assault charge was the defendant's knocking victim Smith to the ground and injuring the victim's hands and knees *after* the defendant had struck the victim with a jug of kerosene, the basis for the aggravated assault charged in count two. Thus, as theorized by the State, count three was not duplicitous of count two, and although the hypothetical outcome of litigation on this point is debatable, *see State v. Pelayo*, 881 S.W.2d 7, 13 (Tenn. Crim. App. 1994), the issue has not been litigated. All in all, it is not proper for us to address the issue in this opinion.

As is pertinent to this issue, we quote portions of the fact recitation set forth in *Rickie J. Stallings*:

> Viewed in the light most favorable to the state, the proof at trial showed that in July 2002, Joyce Lane-Smith lived in a mobile home residence at 2565 Ridge Road in Sevier County. She was divorced and helping to raise her two teenage daughters. Ms. Lane-Smith testified that she and the defendant had dated for approximately seven years, three of which they lived together in Jefferson City. She ended their relationship in July 2001, but the defendant periodically contacted her. He once came to her trailer uninvited but departed, without incident, after Ms. Lane-Smith told him to leave.
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> On the afternoon of July 28, 2002, Ms. Lane-Smith answered her telephone, and the defendant told her that he had sold his Jefferson City residence and was moving to Florida. She offered "best wishes" and asked the defendant if he was going to replace her daughter's antique mirror that he had broken. Ms. Lane-Smith testified that her question prompted the defendant to go "ballistic," whereupon she told the defendant that she did not have time to speak to him and hung up the telephone.
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> At the time of the telephone calls, Ms. Lane-Smith was living with Chris Smith, whom she later married. Mr. Smith's elderly father was visiting with them that weekend. After learning that the defendant had spoken with her mother, Ms. Lane-Smith contacted the defendant and demanded that he have no further contact with her or her parents. During that telephone call, Mr. Smith picked up an extension telephone and listened until the defendant said in a "threatening manner" that he knew where Mr. Smith's mother lived. Mr. Smith interrupted and advised that if the defendant "messed with his mama" that Mr. Smith would kill the defendant. After the defendant insisted that they meet "to settle this like men," Mr. Smith hung up the extension telephone. Ms. Lane-Smith testified that her telephone was still connected, and when the defendant realized that she was listening, he questioned her multiple times, "Are you ready to die?" Ms. Lane-Smith ended the telephone connection, but the defendant called back wanting to know if Mr. Smith was going to meet him. Ms. Lane-Smith hung up the telephone receiver without speaking.

> Ms. Lane-Smith said that the rest of the day was uneventful until early evening. Mr. Smith's father had gone to bed, Ms. Lane-Smith was inside talking to a friend on the telephone, and Mr. Smith was sitting outside on the porch. Suddenly, Mr. Smith ran into the residence, obtained a gun, and ran outside. Ms. Lane-Smith immediately hung up the telephone, turned on the porch light, and called E911. She reported that someone was outside the trailer, and she could hear a physical confrontation underway. Ms. Lane-Smith testified that she did not see the intruder, and she was too scared to go outside. When the confrontation subsided, she opened the door; Mr. Smith was standing in her view "soaking wet with what smelled like gasoline [or] kerosene." Mr. Smith was wearing short pants, and Ms. Lane-Smith observed that his knees were "all torn up" from fighting and falling on gravel.
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> Mr. Smith testified that it was dusk when he heard "gravels rustling around . . . at the end of the trailer." Mr. Smith became suspicious, went inside where he retrieved a handgun and a hunting knife, and returned outside. He maintained that he said nothing to Ms. Lane-Smith because he did not want to alarm her. Mr. Smith walked toward the end of the trailer where he had parked his truck and boat, and when he reached the front of the truck, the defendant "stepped out from behind the trailer." Mr. Smith testified that when he asked, "What do you think you're doing back here," the defendant claimed he had come over from "1A" to borrow gasoline. Mr. Smith challenged that explanation, said, "You're Rick," grabbed the defendant's shirt with his left hand, and stuck the handgun in his right hand to the defendant's chest. The defendant struck Mr. Smith with a jug containing what smelled like kerosene; the liquid doused Mr. Smith. Mr. Smith grabbed the defendant and began dragging him toward the front of the trailer. The defendant was swinging and fighting, and the men were hitting against the trailer as they moved. When they reached the front of the trailer, Mr. Smith shouted for Ms. Lane-Smith, and the men continued hitting each other. Mr. Smith managed to sling the defendant into a shallow ditch, but the defendant rose and headed to nearby apartments.

Rickie J. Stallings, slip op. at 2-5.

The State also introduced evidence that officers recovered a red cigarette lighter on the ground near the rear of the victim's trailer home. *Id.*, slip op. at 7. The officers also found a black top that had been separated from the lighter. *Id.*

As narrowed by the indictment in the present case charging aggravated assault, Tennessee Code Annotated section 39-13-101 provides that a person commits the offense of assault who "[i]ntentionally or knowingly causes another to reasonably fear imminent bodily injury." T.C.A. § 39-13-101(a)(2) (2003). An assault is graded as "aggravated" when a person "[i]ntentionally or knowingly commits an assault as defined in § 39-13-101 and . . . uses or displays a deadly weapon." *Id.* § 39-13-102(a)(1)(B). A deadly weapon can be "[a] firearm or anything manifestly designed, made or adapted for the purpose of inflicting death or serious bodily injury," *id.* § 39-11-106(a)(5)(A), or it can be "[a]nything that in the manner of its use or intended use is capable of causing death or serious bodily injury," *id.* § 39-11-106(a)(5)(B).

In *McGouey II*, the defendant, when approached by police officers, pointed an unloaded, carbon dioxide powered pellet gun at one of the officers. *McGouey*, 229 S.W.3d at 670. The defendant was convicted of aggravated assault and felony reckless endangerment, "the aggravating factor of each being the use and display of a deadly weapon – an unloaded pellet gun." *Id.* at 669.

The supreme court rejected the "(a)(5)(A)" deadly-weapon-per-se part of the definition; it reasoned that the pellet gun was not a firearm, which is defined as "'any weapon designed, made or adapted to expel a projectile by the action of an explosive or any device readily convertible to that use.'" *Id.* at 672-73 (quoting T.C.A. § 39-11-106(a)(11)). Furthermore, the pellet gun was not shown to have been designed or made for the purpose of inflicting death or serious bodily injury for purposes of *McGouey II* ; "there was *no evidence* that a pellet gun" was so designed or made. *Id.* at 673 (emphasis added).

In analyzing subsection (a)(5)(B)'s "use or intended use," the court stressed that the focus was not upon "how the object was designed to be used, but rather [upon] how the object was used in the particular case." *Id.* at 673. To fathom the use or intended use in the particular case, the court looked at the evidence of record and determined that there was no "evidence of record to suggest that the defendant used or intended to use the unloaded pellet gun in a manner capable of causing [serious] bodily injury or death." *Id.* at 674. In so doing, the *McGouey II* court reversed the court of criminal appeals, which had upheld McGouey's felony convictions in an opinion that was relied upon by this court in *Rickie J. Stallings*. *See Rickie J. Stallings*, slip op. at 23.

In the present case, the gasoline/kerosene-filled plastic milk jug was not a firearm as statutorily defined, and no proof showed that it was designed, made, or adapted for the purpose of inflicting death or bodily injury. As such, it was not a deadly weapon per se pursuant to subsection (a)(5)(A) of Code section 39-11-106.

Thus, we turn to the subsection (a)(5)(B) alternative definition – the use or intended use of the milk jug in a manner capable of producing serious bodily injury or death. In *Rickie J. Stallings*, because we applied alternative (a)(5)(B) per *McGouey I*, we had focused upon whether the object was "capable of causing death or serious bodily injury *when operated as intended*." *Rickie J. Stallings*, slip op. at 23 (quoting *McGouey I*, slip op. at 4). In the wake of *McGouey II*, we look in applying alternative (a)(5)(B) not at the designer's purpose or intent but at the defendant's actual use or intended use, based upon the evidence of record. We point out that, in an aggravated assault case, the concept of a deadly weapon pursuant to subsection (a)(5)(B) and *McGouey II* is about the user's intent, not the perception of the victim. *Compare* T.C.A. § 39-13-102(a)(1)(B), (a)(2)(B) (proscribing as aggravated assault an assault via the use or display of a deadly weapon) *with*, *e.g.*, *id.* § 39-13-502(a)(1) (proscribing as aggravated rape a rape accomplished when "the defendant is armed with a weapon or any article used or fashioned in a manner to lead the victim reasonably to believe it to be a weapon") *and id.* § 39-13-402(a)(1) (proscribing as aggravated robbery a robbery accomplished "with a deadly weapon or by display of any article used or fashioned to lead the victim to reasonably believe it to be a deadly weapon").

Shaded by the light of *McGouey II*, although the evidence showed that the defendant may have intended to commit arson, it failed to establish that he used or intended to use the milk jug as a means of inflicting serious bodily injury upon, or as a means of killing, the victim. The evidence established neither an attempt by, nor the intent of, the defendant to ignite the mixture from the milk jug during his struggle with the victim. The discovered lighter was not directly linked to the defendant. Even if the lighter could be linked to the defendant circumstantially, the evidence did not show that he possessed it for a purpose other than arson, that he held it during the struggle, or that it was in working order. Moreover, no evidence was introduced to show that the spillage of the jug's contents upon the victim, even if not ignited, could result in the victim's serious bodily injury; nor did the State introduce evidence that the jug itself was capable of producing serious bodily injury or death.

Under these circumstances, a *McGouey II* evidentiary analysis results in a conclusion that the evidence was insufficient to show that the defendant committed the assault via the use or display of a deadly weapon. In view of that determination, the aggravated assault conviction must be degraded to one of assault, a Class A misdemeanor. *See* T.C.A. § 39-13-101(a)(2), (b) (2003). We defer a disposition of the sentencing for this lesser include offense until we discuss the overall sentencing impact of *Gomez II*.

III. Invalidity of Pre-2005 Sentencing Code Provisions

On June 24, 2004, in *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004), the United States Supreme Court signaled that some judge-sentencing regimes conflicted with criminal defendants' rights to have juries participate in certain sentencing determinations. *Blakely* held that "'[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.'" *Id.* at 301, 124 S. Ct. at 2536 (quoting *Appendi v. New Jersey*, 530 U.S. 466,

490, 120 S. Ct. 2348, 2362-63 (2000)). The "statutory maximum" to which a trial court may sentence a defendant is not the maximum sentence after application of appropriate enhancement factors, other than the fact of a prior conviction, but the "maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." *Id.* at 303, 124 S. Ct. at 2537. Under *Blakely*, the "statutory maximum" sentence which may be imposed is the presumptive sentence applicable to his or her offense. *See id.*, 124 S. Ct. at 2537. The presumptive sentence may be exceeded without the participation of a jury only when the defendant has a prior conviction and/or when an otherwise applicable enhancement factor was reflected in the jury's verdict or was admitted by the defendant.

On January 22, 2007, the United States Supreme Court released its decision in *Cunningham v. California*, 549 U.S. —, 127 S. Ct. 856 (2007), holding that California's sentencing scheme did not survive Sixth Amendment scrutiny intact under *Blakely*. The Tennessee Supreme Court had held that a judge-enhanced sentence pursuant to Tennessee's pre-2005 sentencing regime did not amount to plain error and warranted no relief, *see Gomez I*; however, on the heels of *Cunningham*, on February 20, 2007, the United States Supreme Court vacated *Gomez I* and remanded that case for reconsideration in light of *Cunningham*, see *Gomez v. Tennessee*, — U.S. —, 127 S. Ct. 1209 (2007).

On remand in *Gomez*, the Tennessee Supreme Court applied the principles of *Blakely* and *Cunningham* to determine that Tennessee's pre-2005 sentencing code violated Gomez' right to jury trial. *See generally Gomez II*.

The sentences at issue in the present case are those the defendant challenged on direct appeal – the felony sentences for attempted aggravated arson and for aggravated assault.

In the present case, the trial court enhanced the defendant's attempted aggravated arson sentence via enhancement factors (2), that the defendant had a prior record of criminal convictions; (4), that the offense involved more than one victim; (9), that the defendant had a previous history of non-compliance with conditions of release into the community; and (10), that the defendant possessed or employed a deadly weapon when committing the offense. *See* T.C.A. § 40-35-114(2), (4), (9), (10) (2003) (amended 2005). In mitigation of the sentences, the trial court considered the defendant's record of employment and his good character references.

As a result, the trial court imposed a Range-maximum sentence of 12 years for attempted aggravated arson, a Class B felony. *See* T.C.A. 39-14-302(b)(1) (2003); *id.* § 39-12-107(a). The 2003 presumptive sentence for a Class B felony in sentencing Range I was eight years. *See id.* § 40-35-111(b)(2) (2003); § 40-35-112(a)(2); *id.* § 40-35-210(c). In *Rickie J. Stallings*, this court determined on state-law grounds that factors (4), (9), and (10) should not have been applied in sentencing for attempted aggravated arson. Additionally, we determined that the trial court should not have used the midpoint in the sentencing Range – 10 years – as the presumptive sentence; however, upon de novo sentencing, we applied, in addition to factor (2) for prior criminal record, enhancement factors (5), that a victim of the offense was particularly vulnerable because of age or

physical or mental disability, and (11), that the defendant had no hesitation about committing a crime when the risk to human life was high. *Rickie J. Stallings*, slip op. at 31-33. Thus, utilizing enhancement factors (2), (5), and (11), we modified the attempted aggravated arson sentence to 11 years.

The trial court enhanced the sentence for aggravated assault via factors (2) and (9) and imposed the Range-maximum sentence of six years for this Class C offense. *See* § 39-1102(d)(1); *id.* § 40-35-112(a)(3). The 2003 presumptive sentence for this offense was three years. *See id.* § 40-35-210(c). In *Rickie J. Stallings*, this court rejected the use of factor (9) and relied solely upon factor (2) for enhancement purposes, and as a result, we modified the sentence for aggravated assault to five years. *Rickie J. Stallings*, slip op. at 34.

With this background in mind, we proceed along certain contours. First, the defendant was tried in 2004, prior to the enactment of the 2005 "*Blakely*" amendments to the sentencing law. Second, he was sentenced after the filing of *Blakely*. In that regard, the defendant did not raise the Sixth Amendment issue prior to his October 25, 2004, post-*Blakely* sentencing hearing, but he did raise the issue in a timely motion for new trial, as amended. As such, the issue was adjudicated by the trial court prior to the direct appeal, and therefore, we conduct a plenary review of the issue. *See State v. Schiefelbein*, 230 S.W.3d 88, 150, n.1 (Tenn. Crim. App. 2007) (order on petition for rehearing) (extending plenary review of *Blakely* issue that had first been raised in the trial court). Third, due to the errors in applying enhancement factors as adjudicated in *Rickie J. Stallings*, our review of the sentencing is de novo, unaccompanied by a presumption of correctness. *See* T.C.A. § 40-35-401(d); *State v. Ashby*, 823 S.W.2d 166, 169 (Tenn.1991) (stating that sentencing presumption of correctness is "conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances"). Finally, the sentencing issue in the Class C felony of aggravated assault is moot, given our determination in the second segment of this opinion that the aggravated assault conviction must be reduced to a conviction of the Class A misdemeanor offense of assault.

Thus, the defendant's attempted aggravated arson sentence must conform to the pre-2005 sentencing law but must comply with *Blakely* and its progeny. The use of factors (5) and (11) to enhance that sentence is prohibited by *Blakely*. Factor (2), the defendant's prior criminal record, remains as the only applicable enhancement factor for attempted aggravated arson.

Turning to remedy, at oral argument, the parties espoused resentencing by this court, and we agree that the record enables us to impose new sentences for attempted aggravated arson and for the Class A misdemeanor offense of assault.

The defendant's prior criminal record consisted of three convictions of public intoxication, two convictions of resisting arrest, an assault conviction, and a driving while intoxicated conviction. We noted in *Rickie J. Stallings* that the defendant's prior criminal record was worthy of moderate enhancement weight. *Rickie J. Stallings*, slip op. at 34. Beginning at the presumptive sentence of eight years, we enhance the sentence to 10 years in the Department of

Correction. As we did in *Rickie J. Stallings*, *id.*, we decline to weigh the asserted mitigating factors enough to lower the elevated sentence, and hence, we impose a sentence of 10 years for attempted aggravated arson.

We now turn to the sentence for the newly imposed conviction of assault in count two of the indictment. Misdemeanor sentences must be specific and in accordance with the principles, purpose, and goals of the Criminal Sentencing Reform Act of 1989. T.C.A. §§ 40-35-104, -302 (2006); *State v. Palmer*, 902 S.W.2d 391, 393 (Tenn. 1995). The misdemeanor offender must be sentenced to an authorized determinant sentence with a percentage of that sentence designated for eligibility for rehabilitative programs. Generally, a percentage of not greater than 75 percent of the sentence should be fixed for a misdemeanor offender. *Palmer*, 902 S.W.2d at 393-94. A convicted misdemeanant has no presumption of entitlement to a minimum sentence. *State v. Baker*, 966 S.W.2d 429, 434 (Tenn. Crim. App. 1997); *State v. Creasy*, 885 S.W.2d 829, 832 (Tenn. Crim. App. 1994). The misdemeanor sentencing statute requires that the trial court consider the enhancement and mitigating factors when calculating the percentage of the sentence to be served "in actual confinement" prior to "consideration for work release, furlough, trusty status and related rehabilitative programs." T.C.A. § 40-35-302(d) (2006)*; State v. Troutman*, 979 S.W.2d 271, 274 (Tenn. 1998).

Applying these guidelines, we establish the count two sentence at 11 months, 29 days in the county jail, and such sentence is imposed to run consecutively to the 10-year sentence for attempted aggravated arson. On this misdemeanor sentence, and based upon the defendant's prior criminal record that includes an assault and multiple alcohol-related offenses, we provide that the defendant is ineligible for rehabilitative programs until after he serves 75 percent of the 11-month, 29-day sentence.

IV. Conclusion

We reverse the conviction of aggravated assault and impose in lieu thereof a conviction of assault, for which we impose a sentence of 11 months, 29 days, to be served consecutively to the sentence for attempted aggravated arson. We modify the sentence for attempted aggravated arson to 10 years in the Department of Correction.

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JAMES CURWOOD WITT, JR., JUDGE